Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1979

NO. 78-1309

PIOCHE MINES CONSOLIDATED, INC.,
Petitioner

v.

FIDELITY PHILADELPHIA TRUST COMPANY
Respondent

MOTION FOR LEAVE TO FILE PETITION FOR COMMON LAW WRIT OF CERTIORARI OR WRIT OF MANDAMUS
AND
PETITION FOR COMMON LAW WRIT OF CERTIORARI OR WRIT OF MANDAMUS
to the United States Court of Appeals for the Ninth Circuit

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to the United States Court of Appeals for the Ninth Circuit

PIOCHE MINES CONSOLIDATED, INC., Petitioner herein, by FRANCIS T. CORNISH and DAVID HORTON, its attorneys, moves this Court as follows:

1. For leave to file the Petition, hereto annexed, for common law writ of certiorari or for writ of mandamus.

2. Upon granting such leave, to issue a common law writ of certiorari or common law writ of mandamus to the United States Court of Appeals for the Ninth Circuit, in accordance with the prayer of said petition.

Dated: February 17, 1979

FRANCIS T. CORNISH

DAVID HORTON

Attorneys for Petitioner.

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to the United States Court of Appeals for the Ninth Circuit

To the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court, and to the Honorable, the Associate Justices of the United States Supreme Court:

PIOCHE MINES CONSOLIDATED, INC., Petitioner herein, by FRANCIS T. CORNISH and DAVID HORTON, its attorneys, respectfully petitions this Court to issue a common law writ of certiorari or writ of mandamus to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, which has not yet been reported, but was filed on September 11, 1978, and a rehearing of which was denied on November 27, 1978.

OPINION BELOW

The opinion of the Court of Appeals appears in Appendix A, hereto. The Order of the Court of Appeals denying

a rehearing appears in Appendix B, hereto. No opinion was rendered by the United States District Court for the District of Nevada.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 11, 1978. A Petition for rehearing was denied on November 27, 1978. This Petition for Certiorari was docketed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sections 1254 (1), and 2101 (c).

QUESTIONS PRESENTED

1. Whether this Court should exercise its jurisdiction to issue a common law writ of certiorari or writ of mandamus directed to that Court of Appeals on the ground that it abused its discretion in affirming a judgment of the United States District Court for the District of Nevada which dismissed a counterclaim, and thereafter refusing to rehear, or reconsider, that affirmance of the District Court's judgment of dismissal.

2. Whether, under the circumstances of this case, the dismissal of the counterclaim on the sole ground there was delay in prosecuting it, which delay was caused largely by earlier erroneous decisions of the same District Court which dismissed the counterclaim, which erroneous decisions were corrected in eight opinions of the Court of Appeals which were rendered over a period of sixteen years, was in violation of the provisions of the Seventh Amendment of the United States Constitution.

3. Whether, under the circumstances of this case, the dismissal of the counterclaim on the sole ground there was

delay in prosecuting it, which delay was caused largely by earlier erroneous decisions of the same District Court which dismissed the counterclaim, which erroneous decisions were corrected in eight opinions of the Court of Appeals which were rendered over a period of sixteen years, was in violation of the provisions of the Fifth Amendment of the United States Constitution.

4. Whether this Court should exercise its discretion to issue a common law writ of certiorari or mandamus to the Court of Appeals to prevent the misuse of processes of the United States Courts to damage or destroy private property.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides in part:

> "No person shall • • • be deprived • • • property, without due process of law • • •"

and the Seventh Amendment to the United States Constitution which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Pioche Mines Consolidated, Inc., was organized under the laws of Nevada in 1928 to hold the controlling interest of three corporations which owned extensive mining properties in Nevada. Until 1940 it had financed all of its operating needs. Its properties consisted of underground development and a mill from which it was capable of producing ores and minerals. It had built an organization to produce those minerals and an organization capable of financing those operations. Part of this financing had been through a debenture issue in 1929 and 1930. Fidelity Philadelphia Trust Company had been designated as trustee under that issue. In 1939 some of the debenture holders claimed the debentures were in default. They instructed the Trust Company to file suit to recover the amount claimed due. At the same time the debenture holders reserved the right to negotiate a settlement of their claims independent of the Trust Company. The suit was filed in 1940. Simultaneously the Trust Company attached Pioche Mines Consolidated's properties. Pending the suit a Settlement Agreement was negotiated. It was a bilateral executory agreement between the debenture holders and Pioche Mines Consolidated. The Trust Company was not a party to that settlement agreement. Problems arose between the debenture holders and Pioche Mines Consolidated. The Trust Company injected itself into the performance of the settlement agreement. The Trust Company then filed a supplemental complaint by which it sought to compel Pioche Mines Consolidated to perform what the Trust Company claimed Pioche Mines Consolidated was obligated to perform under the settlement agreement.

In so doing the Trust Company withheld the debenture holders from being parties to the action. Pioche Mines Consolidated then filed a compulsory counterclaim in which it charged the Trust Company with interfering with, and obstructing, the performance of the settlement agreement, and in so doing clouding the financial structure of Pioche

Mines Consolidated so it could no longer operate, or finance the operation of its properties. The filing of the supplemental complaint, as the Trust Company did, converted the original action from an action for money into an action by a person who was not a party to the settlement agreement to compel one of the parties to the agreement to perform that agreement and at the same time the other parties who were indispensible to such action were withheld from the action.

The Trust Company then moved the District Court for summary judgment on the supplemental complaint. The motion for summary judgment was opposed, but, notwithstanding that the District Court granted it. This was a judicial error, but it required four decisions of the Court of Appeals to correct it. The first decision was *Pioche Mines Consolidated, Inc. v. Fidelity Philadelphia Trust Company,* 191 F.2d 399 (9th Cir. 1951), in which the Court of Appeals denied a motion to dismiss the appeal and held that the judgment was appealable. A copy of that opinion is attached as Appendix C. The second decision was *Pioche Mines Consolidated v. Fidelity Philadelphia Trust Company,* 202 F.2d 944 (9th Cir. 1953), in which the order granting the summary judgment was reversed because the debenture holders were indispensible parties and they were not parties to the action. A copy of that opinion is attached as Appendix D. The third decision was *Pioche Mines Consolidated v. Fidelity Philadelphia Trust Company,* 206 F.2d 336 (9th Cir. 1953), in which that part of the order granting summary judgment which dismissed the counterclaim was reversed, with leave for Pioche Mines Consolidated to amend its counterclaims. A copy of that opinion is attached as Appendix E. The fourth decision was *Pioche Mines Consolidated v. Hon. Roger T. Foley as Judge of the United States District Court for the District of Nevada,* 237 F.2d 164 (9th Cir. 1956), in which the District Court was mandated to obey the Court of Appeals and dismiss the amended supplemental complaint. A copy of that opinion is attached as Appendix F.

Pursuant to leave having been given by the Court of Appeals, on June 30, 1955 Pioche Mines Consolidated filed its second amended and supplemental counterclaim in which it increased its claim for damages to include the damages which resulted in the interim from its former pleading to the filing of the second amended and supplemental pleading. On April 24, 1956 the Trust Company answered the second amended and supplemental counterclaim on its merits.

The District Court signed a preliminary pretrial comment on June 25, 1958. Pretrial conference order was made on October 2, 1961. A supplemental pretrial order was made on March 27, 1962. The date of the trial of the counterclaim was set for September 10, 1962. On August 29, 1962 the District Court vacated the trial date and took the case off the trial calendar "until the appeal involving the validity of the appointment of the receiver is determined in Civil Case 311."

Until Civil Case 311 was filed Pioche Mines Consolidated was still in such a financial condition that it could, and would have, proceeded to trial of the counterclaim against the Trust Company. In "Civil Case 311" the District Court made a judicial error when it appointed a receiver for the assets of Pioche Mines Consolidated and at the same time enjoined Pioche Mines Consolidated, its officers and its attorneys, from prosecuting the counterclaim.

Pioche Mines Consolidated appealed those orders to the Court of Appeals. It required four more opinions of the Court of Appeals to correct those erroneous rulings of the District Court in "Civil Case 311."

The first decision was *Pioche Mines Consolidated et. al. v. Helen Dolman,* 333 F.2d 257 (9th Cir. 1964). In that opinion the orders appointing the receiver and enjoining Pioche Mines Consolidated from proceeding on the counterclaim against the Trust Company were reversed. A copy of the pertinent portions of that opinion is attached as Appendix G. The second decision was *Pioche Mines Consolidated, et. al. v. Helen Dolman,* 336 F.2d 789 (9th Cir. 1964). In that opinion the Court of Appeal had to "clarify" its earlier decision in 333 F.2d 257. A copy of that clarifying opinion is attached hereto as Appendix H. The third decision was *Ely Valley Mines, Inc. v. Lee and Dolman,* 385 F.2d 188 (9th Cir. 1967). In that opinion the Court of Appeals was quite critical of Helen Dolman and her attorneys in their failure to "understand" the earlier decisions of the Court of Appeals. That opinion is attached hereto as Appendix I. The fourth decision was *Pioche Mines Consolidated v. Hon. Roger T. Foley as Judge of the United States District Court for the District of Nevada* 410 F.2d 742 (9th Cir. 1969). In that opinion the Court of Appeals mandated the District Court to follow the opinions of the Court of Appeals and to compel the receiver to turn over to Pioche Mines Consolidated, forthwith, all of the properties of Pioche Mines Consolidated including the counterclaim and the records pertaining to it which were still under his exclusive control, although his appointment had been invalidated five years earlier. The Court of Appeals said:

> "It simply does not lie in the mouth of the receiver, who is illegally in possession of the corporations' properties, or of the plaintiffs who wrongfully obtained his appointment, or of the judge, who erroneously appointed him, to assert otherwise. A wrong cannot be perpetuated in any such fashion. The trial court has failed to comply with the mandates of this court.
>
> "Let a writ of mandamus issue directing respondent forthwith to order the return by the receiver of the properties, books, files, records and accounts of Pioche Mines Consolidated * * * and to restrain the receiver from in any manner whatever further interfering with the possession and use, by each corporation, of its properties, books, files, records, or accounts."

A copy of the entire opinion which the Court of Appeals rendered is attached hereto as Appendix J.

The Trust Company, through its use of the court processes, with indispensible parties absent, during the first sixteen years this action has been pending deprived Pioche Mines Consolidated of any opportunity to use its properties profitably. When the Trust Company could no longer cripple Pioche Mines Consolidated, the receivership, during ten years from 1960 through 1969, and the erroneous decisions of the District Court which the Court of Appeals had to correct by its eight opinions which covered from 1951 through 1969 made it impossible for Pioche Mines Consolidated to enjoy its properties so it could press its counterclaim. The Trust Company, the receivership and the District Court's erroneous orders, had left Pioche Mines Consolidated in such financial condition that it could progress no further until it could refinance. This could not be

accomplished before 1974, which was five years after the last of the eight decisions of the Court of Appeals.

The Trust Company renewed its destructive efforts by moving to dismiss the counterclaim without giving any notice to the attorneys of record for Pioche Mines Consolidated until after the District Court dismissed the counterclaim, apparently unaware of the fact no notice had been given, although the Court's file showed it had not been given. When the District Court became aware of its error it then set aside the dismissal on the condition that Pioche Mines Consolidated be allowed only fifteen days within which to prepare an opposition to the unnoticed motion to dismiss Pioche Mines Consolidated's counterclaim for lack of diligent prosecution of its counterclaim.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

Federal jurisdiction in the court of first instance was 28 U.S.C. section 1332 in that Fidelity Philadelphia Trust Company was a citizen of the State of Pennsylvania and Pioche Mines Consolidated, Inc., was a citizen of the State of Nevada, and this was judicially established by the four decisions of the Court of Appeals, 191 F.2d 309, 202 F.2d 944, 206 F.2d 336 and 237 F.2d 164, copies of which are attached hereto as Appendix C, Appendix D, Appendix E and Appendix F respectively, each of which decisions is final.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the Court of Appeals, Appendix A, affirms a judgment of the United States District Court for

the District of Nevada which dismissed a compulsory counterclaim by which Pioche Mines Consolidated sought to recover damages done to it by the Trust Company and its attorneys through its tortious interfering with contractual relationships and for their misuse of the processes of the federal courts. The only reason for the dismissal was inactivity in pressing the counterclaim.

The eight earlier opinions of the Court of Appeals which are set forth in the appendices show conclusively that the Trust Company and its attorneys, through their misuse of the processes of the federal courts, and Helen Dolman and her attorneys, through their misuse of the processes of the federal courts, put Pioche Mines Consolidated in a financial position such that it required refinancing before it could continue. There was no showing that Pioche Mines Consolidated failed to take any affirmative action which it was able to take.

The Court of Appeals did not find there was any affirmative action to delay on the part of Pioche Mines. It only found there was unexplainable delay from 1969 to 1974.

The unwarranted litigation with which Pioche Mines Consolidated had to contend, all of which was without any fault on the part of Pioche Mines Consolidated was not considered, but solely the lapse of time, was the basis for the dismissal of its counterclaim.

1. THE TRUST COMPANY USED THE PROCESSES OF THE FEDERAL COURT TO DAMAGE THE PROPERTY OF PIOCHE MINES CONSOLIDATED.

The Trust Company did it in this way. Its attorneys must have known that if they filed the supplemental complaint

in the manner they did, the Trust Company injecting itself into contracts to which it was not a party; it doing so with parties indispensible to the relief sought not being parties to the action, and keeping those indispensible parties out of reach of the District Court in which the action was pending.

The attorneys for the Trust Company prevailed upon the District Court to entertain that action which they must have known could lead nowhere, or, lead to more confusion, which the Trust Company was really seeking. In three of its decisions the Court of Appeals pointed the way to the District Court. It took a fourth decision, over the opposition of the Trust Company's attorneys, to compel the District Court to obey the decisions of the Court of Appeals and to dismiss the complaint of the Trust Company, leaving only the counterclaim left in this action.

The Trust Company perpetuated that action until October 5, 1956, for nearly sixteen years, when the Court of Appeals mandated the District Court to dismiss all complaints filed by the Trust Company, 237 F.2d 164.

As a result of the first four decisions of the Court of Appeals (Appendices C, D, E, and F,) the Trust Company remaining only a defendant in a counterclaim against it for it having interfered with contractual relations and the Trust Company having abused the process of a federal court and thereby damaging Pioche Mines Consolidated.

It changed the Trust Company from an aggressor to a defensive position.

After only the second amended and supplemental counterclaim and the answer thereto remained in the case, in June 1958, the District Court filed a pretrial comment. Six months later the Trust Company sought to withdraw admissions

of fact which it admitted eight years earlier. The effect of the admission was to put to rest any question which might arise thereafter as to whether there had been compliance with Securities and Exchange Commission requirements, a question which had already been resolved in favor of Pioche Mines Consolidated by that commission: The District Court Judge, Hon. John R. Ross made this comment:

> "A rather innocent request on its face. However, in the light of the case history, the request assumes a rather ominous tone in that it may well undo the efforts, good or bad, of some eighteen years of litigation.• • • •
>
> "It might be pointed out that since the inception of this litigation in 1940, the United States Court of Appeals for the Ninth Circuit has filed four opinions in the case all of which were after plaintiff's admissions—which it seeks now to withdraw. • • • This case is an outstanding example of litigation which leads the lay person to believe the Courts and court process are designed to hinder, rather than to expedite, the disposition of litigation. In cases such as this, the delay and confusion is invariably caused by counsel for the respective parties—rather than by the Courts. Unhappily the lay person cannot distinguish between delay caused by Court or counsel."

Thereafter two pretrial conference orders were signed. The trial of the counterclaim was set for September 10, 1962. Pioche Mines Consolidated was then prepared to go to trial. The trial would have proceeded except that twelve days before the date for the trial the District Court took the case off the trial calendar until the determination of the appeal from the order appointing a receiver for Pioche Mines Consolidated in another action, but that other action seriously affected this action.

2. WHEN THE TRUST COMPANY COULD NO FURTHER DAMAGE PIOCHE MINES CONSOLIDATED HELEN DOLMAN USED THE PROCESSES OF THE FEDERAL COURTS TO DAMAGE PIOCHE MINES CONSOLIDATED

The two law suits commenced against Pioche Mines Consolidated, the suit by the Trust Company and the suit by Helen Dolman, have this in common. Each case started by abusing the processes of the federal court. In each the attorney for its adversaries sought to prevail upon the federal court to commit error. In each the errors were corrected by three decisions of the Court of Appeals. In each the attorneys for the adversary prevailed upon the District Court to disregard three decisions of the Court of Appeals. In each the Court of Appeals had to mandate the District Court to obey the Court of Appeals. While each suit was pending the properties of Pioche Mines Consolidated were held in idleness. While each suit was pending Pioche Mines Consolidated was prevented from earning income from its properties. To recover from the damage in each suit Pioche Mines Consolidated had to be reorganized and refinanced.

When the Trust Company could go no further, only days before the trial date fixed for the counterclaim, came Helen Dolman.

Again with an inadequate showing to obtain the relief granted the District Court was prevailed upon to appoint a receiver, to issue injunctions, and thereby divest Pioche Mines Consolidated of all its properties, and to put Pioche Mines Consolidated's counterclaim into the hands of strangers, where it remained until after April 28, 1969.

The receivership was initiated not for the welfare of Pioche Mines Consolidated but to destroy it.

The attorneys for the receiver misled the District Court.

The orders sought by Helen Dolman's attorneys, and obtained from the District Court, enjoined Pioche Mines Consolidated, its officers, its attorneys in this action, from having anything to do with Pioche Mines Consolidated's properties, or its counterclaim, and transferred Pioche Mines Consolidated's properties, records and accounts pertaining to the counterclaim to the receiver. Those orders were reversed by the Court of Appeals May 4, 1964, but it took another five years, until April 28, 1969, when in its eighth opinion of the Court of Appeals in this action and the allied actions, that the receiver returned to Pioche Mines Consolidated any of its properties and its records, and its right to press its counterclaim.

3. THE EFFORTS TO USE THE PROCESSES OF THE FEDERAL COURTS WERE SUCCESSFUL BECAUSE OF ERRONEOUS RULINGS OF THE DISTRICT COURT

The errors made by the District Court were:

1. Entertaining the supplemental complaint;
2. Granting the motion for summary judgment;
3. Dismissing the counterclaim;
4. Not dismissing the supplemental complaint when ordered by the Court of Appeals to do so;
5. Vacating the order setting the counterclaim for trial;

6. Dismissing the counterclaim without notice to the attorneys of record for Pioche Mines Consolidated;

7. Appointing a receiver for Pioche Mines Consolidated;

8. Enjoining the officers and attorneys for Pioche Mines Consolidated;

9. Perpetuating the receivership and injunction.

4. ALTHOUGH THE COURT OF APPEALS CORRECTED THOSE ERRORS THE ATTORNEYS FOR THE ANTAGONISTS PREVAILED UPON THE DISTRICT COURT TO DISREGARD THE DECISIONS OF THE COURT OF APPEALS

This happened twice. The first time was when the supplemental complaint had been ordered to be dismissed. The Court of Appeals, over the opposition of the attorneys for Trust Company, on October 5, 1956, mandamused the District Court to dismiss the amended supplemental complaint counterclaim on October 5, 1956 (Appendix F). The second time was when on April 28, 1969, the Court of Appeals mandamused the District Court to compel the receiver to restore Pioche Mines Consolidated's assets (Appendix J).

5. THE EFFECT OF THE ABUSE OF THE PROCESSES OF THE FEDERAL COURT WAS TO BANKRUPT PIOCHE MINES CONSOLIDATED

The Court of Appeals recognized that substantial injury had been done to Pioche Mines Consolidated when it said in *Pioche Mines Consolidated v. Roger T. Foley as judge*, 410 F.2d 742 (Appendix J):

> "It simply does not lie in the mouth of the receiver, who is illegally in possession of the corporations' properties, or of the plaintiffs, who wrongfully obtained his appointment, or of the judge, who erroneously appointed him, to assert otherwise. A wrong cannot be perpetuated in any such fashion. The trial court has failed to comply with the mandates of this Court."

In 1940 Pioche Mines Consolidated owned a multimillion dollar project with mining properties, mines, a mill, a financing organization, operating organization and management. It was held in idleness by the Trust Company's action from 1940 through 1956. Pioche Mines Consolidated was then ready to try its counterclaims. But in 1962, just before the trial was to be held, its properties, its records, all of its assets, even its counterclaim, was taken from it, and its officers and its attorneys were enjoined from dealing with its properties.

If mining properties are not kept up they deteriorate.

A mine which has been left idle for twenty nine years, has been bereft of its management, its operating staff and development staff, is far from a liquid asset.

The Trust Company conducted its lawsuits for the sole purpose of ruining Pioche Mines Consolidated. It succeeded. Today Pioche Mines Consolidated has no organization, but only deteriorated properties and no means of revitalizing what was there thirty eight years ago. Until the properties are rehabilitated they cannot be put into profitable operation. This cannot be accomplished until the company is re-financed. Men with capital of that type are not interested in buying a lawsuit.

Until Pioche Mines Consolidated can be recapitalized all it has left is a counterclaim against the Trust Company for

the damages done to it by the Trust Company through it interfering with contractual relationship between some of its debenture holders and Pioche Mines Consolidated, to which contract the Trust Company was not a party.

To have dismissed that counterclaim on the sole ground of passage of time in the face of the obstacles with which Pioche Mines Consolidated was confronted for thirty six years is a miscarriage of justice. It is a miracle that Pioche Mines Consolidated survived it having had to resort, eight times, each successfully, to help from the Court of Appeals, over a period from 1940, through 1951, through 1969.

To dismiss a meritorious counterclaim for lack of diligent prosecution on the sole ground of lapse of time in spite of the facts shown by the eight opinions of the Court of Appeals (Appendices C, D, E, F, G, H, I, and J) must be called to the attention of the highest Court of the land. It is the only court which has jurisdiction or power to correct the misuse of the processes of the Federal Courts to which Pioche Mines Consolidated was subjected.

This Court should vacate the Order of the United States District Court for the District of Nevada, and the decision of the Court of Appeals by which the Court of Appeals affirms that judgment of dismissal, which were for the sole reason Pioche Mines Consolidated had delayed in pressing the counterclaim, in spite of the obstacles with which Pioche Mines Consolidated was subjected.

The erroneous rulings of the United States District Court for the District of Nevada which the Court of Appeals had to correct, and the misconduct of the receiver

who was wrongfully appointed, but by the United States District Court for the District of Nevada, so emasculated Pioche Mines Consolidated that it was a miscarriage of justice for the United States District Court for the District of Nevada to have deprived Pioche Mines Consolidated of its only redress against the Trust Company which was its compulsory counterclaim which it had to file because the Trust Company filed the action in 1940 and maintained that action until 1956 (237 F.2d 164) (Appendix F).

6. THE UNITED STATES SUPREME COURT SHOULD NOT SANCTION THE PROCESSES OF THE FEDERAL COURTS BEING ABUSED

The United States is a land of laws. There must be laws. They guide us. They protect us. Those laws are the security of our people. Security in those laws exists only as long as we have courts. The Supreme Court of the United States supervises all federal courts. The Supreme Court may take into its hands any action pending in any of the federal courts at any time.

Every litigant has to depend on our federal courts and judges. Every person who depends on a federal court expects that that court will mete out justice to him.

At the same time there are those who would pervert our court system, not to seek justice, but to take private property, even to steal property to which they are not entitled. This is done by misleading the court, which if successful, undermines our court system, and destroys the confidence of the people in those courts, and its judges.

Anyone who deliberately misuses the court's processes is a menace to society. Pioche Mines Consolidated asks that the highest Court in the land recognize that the Seventh Amendment of the United States Constitution, which reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

and the Fifth Amendment to the United States Constitution, which reads in part:

> "No person shall * * * be deprived * * * property, without due process of law * * *"

have been circumvented by the Trust Company by its deliberate tortious conduct.

If the dismissal of the counterclaim meets with the approval of this Court and the abuses of the processes of the federal courts also meet with the approval of this Court then it is an indictment of the federal court system.

Denial by this Court of a review of the decision of the Court of Appeals, the highest Court in the land thereby puts its stamp of approval on abusing the processes of the federal courts.

The highest Court in the land should be afforded the chance to rectify such a miscarriage of justice. It was brought on in a large part by the federal courts themselves through their failure to promptly realize that apparently respectable litigants were in fact attempting to

blind the court to the fact that such apparently respectable litigants were in fact prevailing upon, yes deceiving, the federal courts so as to enable the litigants to abuse the processes of that court, not to assert rights to which they were entitled, but to use the courts to tie up properties of their legal antagonists, not to assert rights, but in reality to pervert justice.

This Court should guard its lower courts against the assaults against their integrity. To enable this Court to do so this Court should issue the writ of certiorari so it may examine the entire record and do justice to all parties.

The eight opinions of the Court of Appeals indisputably show that Pioche Mines Consolidated was wrecked.

CONCLUSION

Petitioner asks that the highest Court in the United States recognize that abuse or misuse of the processes of the federal courts which deprives a litigant of the right to a jury trial, or which deprives the litigant of his property without a fair hearing, is an invasion of the litigant's rights given by the United States Constitution, which this Court should review.

Therefore Petitioner respectfully petitions this Court to issue its writ of certiorari and to examine and review the opinion of the United States Court of Appeals for the Ninth Circuit made in this action on September 11, 1978 with every confidence that upon so doing this Court will reverse that opinion and upon so doing will mandate the Court of Appeals to vacate its judgment of dismissal and direct the United States District Court for the Dis-

trict of Nevada to fix a trial date which date Pioche Mines Consolidated's Second Amended and Supplemental Counterclaim filed in that United States District Court on June 30, 1955 on which the issues of said counterclaim and the reply thereto be tried by a jury.

Dated, February 17, 1979

Respectfully

FRANCIS T. CORNISH
DAVID HORTON
Attorneys for Petitioner

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

Nos. 76-3180
and 76-3443

Fidelity Philadelphia Trust Company,
Appellee,

vs.

Pioche Mines Consolidated, Inc.,
Appellant.

[Filed September 11, 1978]

Appeal from the United States District Court
for the District of Nevada.

OPINION

Before: BARNES and GOODWIN, Circuit Judges, and MUECKE*, District Judge.

Muecke, District Judge:

This appeal involves a counterclaim filed by appellant, Pioche, against appellee, Fidelity, which was originally filed in 1940 and has been pending in its final form since 1956. That counterclaim was dismissed by order of the district court, and it is from that order that this appeal arises.

Fidelity filed their first motion to dismiss the counterclaim November 1, 1960 alleging lack of prosecution as four and one-half years had passed since the filing of the final

*The Honorable C. A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

form of counterclaim. That motion was denied on June 5, 1961. A pretrial conference was held the next day at which time the matter was set for trial to commence December 4, 1961. That date was re-set four times with the last date being vacated on August 29, 1962 at the request of Pioche. It has never been re-set since. (The complaint has long since been dismissed and the only issue to be tried was the counterclaim.)

Fidelity filed their second motion to dismiss for lack of prosecution on June 18, 1974. That motion was served on certain counsel and officers of Pioche, but was not served on their counsel of record. The court below granted that motion on October 25, 1974, but set that order aside on August 28, 1975 so that Pioche could respond. On October 2, 1975 the motion was referred to the Magistrate pursuant to a Local Standing Order in which the parties agreed to accept the Magistrate's order as final with the right to file specific objections to the District Court. A hearing was held by the Magistrate on November 7, 1975 at which time the motion to dismiss was granted. Pioche filed a motion to re-argue along with additional evidence. That motion was denied on June 17, 1975 and a formal ruling granting the motion to dismiss was entered by the Magistrate on June 18, 1975.

Objections to the June 18 order were filed with the District Court, which objections were overruled on July 12, 1975. It is from that order that this appeal comes.

The two key dates in analyzing the delay in prosecution of this case are 1962 and 1969. The delay from 1956 to 1962 was, at least in part, caused by Fidelity. Therefore, that

delay should not be used as a basis for dismissal of the counterclaim. Pioche also argues that the delay from 1962 to the date on which the mandamus order was issued in 1969 by this court was also unavoidable and partly the fault of Fidelity because of the pending receivership. However, that action was not a direct bar to the prosecution of the counterclaim and Pioche did not apply to the court for a stay on that counterclaim.

There is some merit to Pioche's argument that they could not proceed with the counterclaim until the records were returned by the receiver, which did not happen until the writ was issued in 1969.

There is, however, no excuse for the delay from the time the writ was issued in 1969 until the date on which the case was dismissed for lack of prosecution—six years of inactivity. Nothing was done on the case for five years, until 1974 when certain records were discovered missing. And even then it was not until seven months after the motion to dismiss was filed that Pioche's attorney even got involved in seeking those records. Appellant cannot use his actions after the motion to dismiss was filed as evidence of his diligence in prosecuting the suit.

Even had Pioche been actively seeking the production of the lost records, this was no excuse for the lack of prosecution. Federal Rules of Evidence 1003 and 1004 allow copies of records to be used in place of lost originals. Such copies were available and could have been used if the originals had not appeared prior to trial.

A district court's dismissal for failure to prosecute a claim with reasonable diligence will not be overturned un-

less the district judge clearly abused his discretion. This Court should not overturn that discretion unless there is "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir., 1976).

A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision. *Premium Service Corp. v. Sperry & Hutchinson,* 511 F.2d 225, 229 (9th Cir., 1975). Furthermore, the rule is that unreasonable delay creates a presumption of injury to the defendant. *Alexander v. Pacific Maritime,* 434 F.2d 281, 283 (9th Cir., 1970). In this case a total of thirteen witnesses died, seven prior to the first 1960 motion to dismiss, and six more prior to the filing of the second such motion.

It is a well established rule that the duty to move a case is on the plaintiff and not on the defendant or the court. *Boudreau v. U. S.*, 250 F.2d 209 (9th Cir., 1957); *Hicks v. Bekins Moving & Storage,* 115 F.2d 406 (9th Cir., 1940).

In this case there was a twelve-year delay (1962 to 1974) and, at the very least, a five-year delay (1969 to 1974). The finding by the District Court that this delay justified a dismisal of the counterclaim for lack of prosecution was not an abuse of that Court's discretion and this Court will, therefore, not disturb that ruling. The District Court's judgment in dismissing the counterclaim is, therefore, affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Nos. 76-3180
and 76-3443

Pioche Mines Consolidated, Inc.,
Plaintiff-Appellant,

vs.

Fidelity Philadelphia Trust Company,
Defendant-Appellee.

[Filed November 27, 1978]

Before: BARNES and GOODWIN, Circuit Judges, and MUECKE*, District Judge

The Petition for Rehearing is DENIED.

*The Honorable C. A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

Appendix C

Reported 191 F.2d 399

United States Court of Appeals

for the Ninth Circuit

No. 12865

Pioche Mines Consolidated, Inc., et al.

vs.

Fidelity-Philadelphia Trust Co., et al.

[August 31, 1951]

Before: DENMAN, Chief Judge, and HEALY and BONE, Circuit Judges.

DENMAN, Chief Judge.

This is a motion by the appellee, Fidelity-Philadelphia Trust Company, to dismiss an appeal by Pioche Mines Consolidated, Pioche Mines and others from a summary judgment of the district court entered on May 11, 1950 and directing the parties herein to perform a Settlement Agreement executed by them. That Agreement provided for a reorganization of the appellant corporations and another corporation into a single company and was intended by the parties as a compromise of previous litigation between them.

Performance of this Agreement involves, among other things, the transfer of new income bonds by the appellants to the appellee in return for old debentures of the companies

undergoing reorganization. It will also mean that the appellants must endeavor to sell for cash preference notes in the new company so that legal expenses of the reorganization may be paid.

The successful suitor under the summary judgment seeks to have a dismissal of this appeal on the ground that the district court has not disposed of matters in the original complaint and has therefore violated Rule 54(b), Federal Rules of Civil Procedure, 28 U.S.C.A.[1] We think no disposition of the original complaint was necessary. A supplemental complaint praying for enforcement of the Settlement Agreement was also filed; and the appellee prevailed on this claim. In it was merged by virtue of the Settlement Agreement the controversy represented by the original complaint and answer thereto. This merger of all matters between the parties in the supplemental complaint is no more in effect than an amendment of the original complaint. When judgment is rendered on an amended complaint, no dismissal of the original unamended complaint is necessary.

The appellee contends the order is not appealable because the district court has reserved power to make further orders in the case. Assuming that the other requirements

[1]"(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

of finality are met, a "reservation to make further orders does not mean orders inconsistent with the finality of the judgment." Johnson v. Wilson, 9 Cir., 118 F.2d 557, 558.

Furthermore, the order is appealable despite the reservation of power by the district court since the order requires the immediate disposition of property. Preference notes must be sold to finance the reorganization scheme provided for in the Settlement Agreement; and transfers of bonds between the parties must be made. This brings the case within the rule of Dean v. Nelson, 10 Wall. 158, 19 L.Ed. 926; cf. Forgay v. Conrad, 6 How. 201, 12 L.Ed. 404; Carondelet Canal & Nav. Co. v. Louisiana, 233 U.S. 362, 34 S.Ct. 627, 58 L.Ed. 1001; Radio Station WOW v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092.

The motion to dismiss is denied.

Appendix D

Reported 202 F.2d 944

United States Court of Appeals
for the Ninth Circuit

No. 12865

Pioche Mines Consol., Inc. et al.

v.

Fidelity-Philadelphia Trust Co. et al.

[March 23, 1953]

Before: STEPHENS, HEALY, and BONE, Circuit Judges.

HEALY, Circuit Judge.

This is an appeal from a summary judgment granted on motion of Fidelity-Philadelphia Trust Company, plaintiff below, and from the dismissal of a complaint in intervention of Baker and a counterclaim of Pioche Mines Consolidated and its president, Janney, who were defendants.

Pioche Mines Consolidated, a Nevada corporation, hereafter referred to as Consolidated, was formed in 1928 to hold the controlling interest in two other Nevada companies, Pioche Mines Company and Nevada Volcano Mines Company. Consolidated issued debenture bonds in the amount of several hundred thousand dollars in 1929 and 1930, mostly acquired by persons in the east. It was agreed that Fidelity-

Philadelphia Trust Company, a Pennsylvania corporation, should act as trustee in these bond issues.

Thereafter Consolidated defaulted in payment of the obligations. In 1939 a group of the eastern debenture holders representing a majority of the outstanding debentures met and executed a Debenture Holders' Agreement. In this document these holders agreed, inter alia, to deposit their debentures with Fidelity as trustee to take such action relating thereto as the holders should direct, reserving to the holders the right to make a settlement agreement with Consolidated. In addition, the agreement set up a Debenture Holders' Committee of four men (two of whom survive), which was given broad powers generally to execute the agreement and to represent the debenture holders in all dealings with Fidelity and Consolidated. In 1940, on order of the Committee, Fidelity as trustee filed a diversity suit in the District Court for Nevada against Consolidated, Pioche Mines Company, and John Janney, president of Consolidated, to recover the principal and interest of the bonds. While depositions were being taken in that action, it was agreed that the suit should be settled. The result was a "Settlement Agreement," drawn up in 1942, and to which the parties were Consolidated, Debenture Holders' Committee, and a creditors' committee representing various creditors of the three companies. Fidelity was not a party to it.

The Settlement Agreement provided that the three Nevada companies were to be consolidated into a new company which would take title to all properties owned by the three. It further provided: (1) That Consolidated should issue

30-year income bonds to the debenture holders in exchange for the old debentures; (2) that Consolidated should issue 5-year preference notes to secure cash to finance the reorganization; and (3) that a certain amount of 30-year income notes should be issued to cover certain debts and reorganization expenses. Under the terms of this contract all parties to it agreed to use their best efforts to obtain cash in exchange for the preference notes, and also agreed to use their best efforts to obtain a long-term lease of the properties, under which the new company to be formed would have an assured income. Finally, the agreement provided for the eventual discontinuance of all legal proceedings then pending.

Difficulties arose in carrying out the Settlement Agreement. A statutory merger of the three companies under Nevada law was effected in late 1943. A dispute then arose between the parties as to whether the income bonds to be transmitted to the debenture holders complied with the Trust Indenture Act of 1933. After resolution of that issue, the impasse which resulted in the present proceedings arose. Pursuant to previous correspondence, Consolidated had sent to Fidelity, at the latter's request, most of the income bonds for transmittal to the debenture holders. The Debenture Holders' Committee thereupon instructed Fidelity to hold both the old debentures and the new income bonds, taking the position that Consolidated should complete its duties under the agreement, including the sale of the preference notes, after which a closing settlement would be held at which time all matters remaining would be settled and the old debentures delivered for cancellation. Consolidated, on the other hand, insisted that the old debentures must

first be exchanged for the new income bonds. Until that was done, Consolidated contended, the preference notes would not be marketable. The result was a complete deadlock, with Fidelity holding both sets of securities, and neither party to the Settlement Agreement willing to budge.

Thereafter, in May of 1946 (the dismissal of the original suit as contemplated by the Settlement Agreement not having been effected), Fidelity filed in the District Court a pleading entitled "Supplemental Complaint." This pleading had the effect of completely changing the character of the action then pending. It alleged the execution of the Settlement Agreement by the Debenture Holders' Committee and Consolidated; set forth the terms of that agreement; and alleged that it had been performed in certain particulars, and had not been performed in others. The basic prayer of the complaint was that the court enter its order directing the parties to the action to perform the remaining unperformed obligations imposed upon them respectively by the agreement at such time and in such manner as the court might direct. Consolidated answered this complaint, and at the same time moved the court to order the joinder of the Debenture Holders' Committee as party plaintiff. Also proffered at that time was a counterclaim, with a motion for leave to file. The counterclaim alleged the existence of a conspiracy between Fidelity and the Debenture Holders' Committee and the carrying out by them of certain acts for the purpose of preventing the consummation of the Settlement Agreement and for the purpose of financially crippling Consolidated so that it could be taken over cheaply by the debenture holders. The counterclaim asked for damages of $3,000,000.

While these motions were pending, Fidelity moved for summary judgment on its supplemental complaint, supported by affidavits. Before this latter motion was decided, the court denied Consolidated's motion to join Debenture Holders' Committee as a party, but granted permission to file the counterclaim. Fidelity answered the counterclaim. Meanwhile Baker, one of the parties to the contract who had not been a party to the action previously was permitted to intervene, and joined in seeking the relief prayed for in the counterclaim. Fidelity answered his complaint on the merits. Prior to the hearing on the motion for summary judgment, Consolidated filed counter-affidavits, and made numerous motions relating to the sufficiency of Fidelity's showing on its motion. After hearing, the court decided there was no genuine issue of fact raised on the supplemental complaint and the answer to it; dismissed the counterclaim and the complaint in intervention; and rendered summary judgment for Fidelity ordering, among other things, the following: (1) That plaintiffs and defendants perform the remaining unperformed obligations of the Settlement Agreement; (2) that the securities transmitted by Consolidated to Fidelity be exchanged for the old debentures, and that the latter be deposited in court; and (3) that the plaintiffs and defendants together take the necessary steps to obtain cash for the preference notes described in the Settlement Agreement. This appeal followed.

Consolidated advances several contentions, one of which —and the only one we will notice—is that Fidelity's action should have been dismissed because of the failure of the court on Consolidated's motion to join indispensable parties, namely, the members of the Debenture Holders' Committee.

See Rule 19, F.R.C.P., 28 U.S.C.A. These parties, not being amenable to service in the district of Nevada, could not of course be brought in by process.

Responding to the claim that a dismissal was imperative because of the absence of indispensable parties, Fidelity argues that since indispensability is not jurisdictional, but is based on equity, the Debenture Holders' Committee should not be held indispensable in the circumstances of this case. We are not able to agree. As observed in 3 Moore's Federal Practice § 19.05, "the concept of indispensability goes beyond federal jurisdiction and touches the very power or the right of the court to make an equitable adjudication, where an indispensable party is not before it. In this situation, barring exceptional equities, it should not proceed without his joinder, even though his citizenship would not destroy jurisdiction in the cases of diversity and alienage, or although it is immaterial, as when jurisdiction is based on the character of the subject matter—a federal question." No exceptional equities are discernible here.

We proceed to consider the nature of the action and the effect of the relief granted. The position taken by Fidelity in bringing its supplemental complaint appears from the statement of its counsel, which the trial judge quoted in his opinion, to the following effect: "[The Settlement Agreement is a contract which provides that] one side shall do certain things and the other side shall do certain things. There has been dispute between the two parties as to how they shall do it and who shall do it first. It has got to a point where nothing can be done, hence the supplemental complaint and presentation of the matter by Fidelity here to see what shall we do, tell us what we shall do, here is the

record, give us judgment which says do this and that and we will go ahead and dispose of the matter."

As already said, the contract is between the Debenture Holders' Committee and Consolidated. Necessarily these must be the "two parties" to whom counsel refers in his statement. We gather that Fidelity and the trial judge regarded Fidelity as a sort of intermediary or stakeholder, waging the suit for the purpose of settling what the parties to the contract should do to carry out their respective engagements. Yet one of those parties was not before the court. The judgment entered runs only against the party who was, namely Consolidated. The judgment directs that "plaintiffs and defendants" take the necessary steps to sell the preference notes; and that "plaintiffs and defendants" perform the remaining unperformed obligations under the Settlement Agreement, which obligations, by the terms of the agreement, would include also using their best efforts to secure a long-term lease of the properties. The "plaintiffs and defendants" in the lower court were Fidelity on the one hand and Consolidated on the other.

Now the Settlement Agreement plainly provided that Consolidated and Debenture Holders' Committee shall use their best efforts to sell the preference notes and to obtain the lease—not that Consolidated and Fidelity shall do so. Clearly the Committee is not bound by the order to carry out *its* contractual obligations; and equally clear is it that the Committee and not a trust company was expected to perform in these respects.

A leading case indicating the criteria by which to determine whether or not a party is indispensable is State of

Washington v. United States, 9 Cir., 87 F.2d 421, 427-428. The court said:

> "From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?
>
> "If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable."

Asking ourselves these questions as related to the situation in the instant case, we get certain answers:

(1) Not only is the interest of the Debenture Holders' Committee not distinct and severable, but it has the only real interest in the Settlement Agreement. Fidelity, not a party to that agreement, could have no valid interest in the manner or method of carrying it out, even though it might be interested in having it performed promptly.

(2) We are unable to see how the court could render justice between the parties before it, since the complaint was based on an allegation that the two parties to the contract had not fulfilled their obligations under it. Debenture Holders' Committee had obligations under that agreement; Fidelity had none. As to the matter of rendering justice, it is notable that the court proceeded to order Consolidated to do a number of things notwithstanding it stated in its opinion that "[t]he impasse spoken of by Fidelity in its brief was created by Fidelity's action in following the instructions of the Debenture Holders' Committee. The instructions of the Debenture Holders' Committee were in violation of the Committee's obligation under the Settlement Agreement, * * *." Yet no order was made or could be made against the absent Committee.

(3) Fidelity urges, in effect, that no injurious consequences will be visited upon the absent Committee or the debenture holders because the order runs in their favor. It points out that Fidelity has already complied with that part of the order requiring it to exchange the securities and deposit the old debentures in court. We think it more than doubtful whether the form of the relief granted is of any consequence, even though it is favorable to the absent party. See Young v. Powell, 5 Cir., 179 F.2d 147, 151-152. It is the relief sought that determines indispensability, and here Fidelity asked that the court order the agreement to be performed. At that time, an order could very well adversely affect the debenture holders. By bringing the supplemental complaint, and by virtue of the order entered, Fidelity has gone ahead and exchanged the debenture holders' past due obligations for 30-year income bonds, without the debenture holders being heard—an exchange Fidelity was instructed by the Committee not to make.

(4) Finally, it is evident that the decision below, in the absence of the Debenture Holders' Committee, is not equitable. We know of no reason, and none is shown, why the absent debenture holders and the Committee could not challenge the validity of the exchange, or why they are otherwise bound by the provisions of the order, or bound to accept as satisfactory what Consolidated might do by way of performance of its obligations under the Settlement Agreement or under the court's order.

Fidelity contends that it had authority to bring the action and bind the debenture holders by cirtue of the Debenture Holders' Agreement of 1939, which it says was incorporated by reference into the Settlement Agreement. Even conceding that the 1939 agreement was incorporated into the Settlement Agreement for any purpose other than to show the authority of the Debenture Holders' Committee to enter into it (a question not entirely without difficulty) we find nothing in the 1939 agreement authorizing this action by Fidelity or purporting to bind the debenture holders. The provisions of the deposit agreement of 1939 appear to make Fidelity a depositary only, and to grant certain powers to it, including the power to bring suit to collect the original obligations. That agreement, however, specifically reserved to the Debenture Holders' Committee, and not to Fidelity, the right "[t]o negotiate with the Pioche Company, [a] settlement for the purpose of avoiding or terminating litigation * * *." and the power "[t]o determine all details relating to the carrying out of this Agreement and any arrangement or settlement negotiated as above provided or involved in the collection, by litigation or otherwise, of the sums so due and payable." We may add that a party to a

contract may assign rights under it, but he cannot assign obligations.

In summary this would appear to be a case where a trust company, not a party to a contract, asks that the contract be interpreted and the rights and obligations of both parties to it be defined and enforced, with only one party to the contract being before the court. It is a situation where the trust company, without a showing of authority, asks that the rights of the absent party be disregarded, and that the company be permitted to perform in the place and stead of such party to the extent that the latter is obligated to perform, and, further, that the party before the court be required to accept the company's volunteer performance as the equivalent of performance by the absent party.

Reversed with directions to dismiss.

Appendix E

Reported in 206 F.2d 336
United States Court of Appeals,
for the Ninth Circuit

No. 12865

Pioche Mines Consol., Inc., et al.

v.

Fidelity-Philadelphia Trust Co. et al.

[July 27, 1953]

Rehearing Denied Sept. 2, 1953.

Before: STEPHENS, HEALY, and BONE, Circuit Judges.

HEALY, Circuit Judge.

We heretofore ordered the dismissal of the supplemental complaint of appellee Fidelity in this case for absence of indispensable parties. Pioche Mines Consolidated v. Fidelity-Philadelphia Trust Co., 202 F.2d 944. In ruling on the case we neglected the issue whether the trial court's dismissal of Pioche's counterclaim was proper. Pioche petitioned for a rehearing requesting that we pass on that matter. Fidelity was asked to present a brief expressing its views on the subject and has done so. To this Pioche has replied, and the neglected issue is now before us for disposition.

Fidelity argues that the dismissal of its complaint renders mandatory a dismissal of the counterclaim also. We think not. Compulsory counterclaims are required to be dismissed only when the complaint is dismissed for want of jurisdiction, which was not the case here. The counterclaim persists where it is supported by an independent ground of federal jurisdiction, Isenberg v. Biddle, 75 U.S. App.D.C. 100, 125 F.2d 741; 3 Moore's Federal Practice § 13.15. Pioche is a resident of Nevada, Fidelity of Pennsylvania; and federal jurisdiction thus rests on diversity. The Debenture Holders' Committee is not an indispensable party to the action on the counterclaim. The cause of action undertaken to be stated in the latter sounds in tort, for which liability is joint and several. In such situation the right may be asserted against any one or more of the tortfeasors, the others not being necessary parties. 3 Moore's Federal Practice § 19.11. See Rule 19, F.R.C.P., 28 U.S.C.A.

Fidelity further contends that the counterclaim was properly dismissed on its motion for summary judgment. It says that the trial court, after a careful study of the lengthy record, determined that no genuine issue of fact was presented by the counterclaim. We do not so understand the attitude of the trial judge. His opinion clearly indicates that, as regards the counterclaim, he was dismissing the first cause of action set out in it on the ground that it attempted to state a claim against Fidelity for breach of the Settlement Agreement, to which Fidelity was not a party. In our view a liberal reading of that count indicates an attempt to state a claim for tortious interference by Fidelity with contractual relations between Pioche and the Debenture Holders' Committee. As regards the second cause

of the counterclaim, it is clear that the judge dismissed it on the narrow ground that the allegations bearing on the existence of tortious conspiracy were not pleaded with sufficient particularity, and also because it was not alleged that Fidelity had acted through any particular officers.

The granting of the summary judgment and the dismissal of the counterclaim were accomplished in a single order. Pioche moved that the order be amended to permit it to amend its counterclaim, but the motion was denied. In view of the liberal spirit as regards amendments displayed in Rule 15 F.R.C.P., we think Pioche should have been given opportunity by amendment to cure if it could the shortcomings of the counterclaim indicated by the judge.

Finally, Fidelity contends that the counterclaim was properly dismissed because directed against Fidelity in its individual capacity, whereas, it is said, Fidelity brought the supplement complaint in its representative or fiduciary capacity. The argument proceeds on the rule that a counterclaim against a trustee in his individual capacity, where he has sued as a fiduciary only, is not permissible inasmuch as it is not a counterclaim against an "opposing party," as contemplated by Rule 13. See Higgins v. Shenango Pottery Co., D.C., 99 F.Supp. 522; Chambers v. Cameron, D.C., 29 F.Supp. 742. We think it highly doubtful that Fidelity should be considered as having brought this action as a fiduciary in the sense of the rule. (See discussion in our original opinion of the position taken by Fidelity in the action.) In any event it would appear that Fidelity has waived the point. It answered the counterclaim on the merits and interposed no objection on the score of its status as a fiduciary.

Rule 12(h) provides that, with certain exceptions not here pertinent, a party waives all defenses and objections which he does not present either by motion or in the answer or reply. This court has interpreted the rule as to require the raising of all affirmative defenses not so excepted in the reply or by motion. Morgan Electric Co. v. Neill, 9 Cir., 198 F.2d 119.

The order or judgment dismissing Pioche's counterclaim is reversed with leave to Pioche to amend the same if so advised.

Appendix F

Reported 237 F.2d 164

United States Court of Appeals
for the Ninth Circuit

No. 15198

Pioche Mines Consolidated, Inc., Pioche Mines Company and John Janney,
Petitioners,

vs.

Hon. Roger T. Foley, as Chief Judge of the United States District Court for the District of Nevada, and the United States District Court for the District of Nevada,
Respondents.

[October 5, 1956]

Before: STEPHENS, HEALY, and BONE,
Circuit Judges.

PER CURIAM.

Petitioners, hereafter generally referred to as Pioche, seek mandate to compel the respondent court and judge to dismiss an "amended supplemental complaint," which was filed by Fidelity (plaintiff below and intervener here) subsequent to our decisions and mandates on prior appeals in this case. The district judge refused to rule on Pioche's motion to dismiss the aforesaid amended supplemental

complaint. Instead, he postponed action thereon until the time of trial.

Our opinions and orders on the prior appearances here of the controversy between Fidelity and Pioche are published in Pioche Mines Consolidated, Inc., v. Fidelity-Philadelphia Trust Co., 191 F.2d 399; 202 F.2d 944; and 206 F.2d 336. For an adequate understanding of what the case is about it is essential that the reader consult those opinions and rulings.

In the earliest of them we held that the supplemental complaint there interposed was tantamount to an amendment of the original complaint, and that the original complaint became merged therein. Our second opinion ordered the dismissal of the supplemental complaint because of the absence of indispensable parties. No leave was given to join indispensable parties. Our mandate commanded that "proceedings be had in said cause, in conformity with the opinion and judgment of this court." Clearly, we intended that Fidelity file no more complaints, however, denominated, in this action.

A writ of mandate will issue directing respondent court and judge to dismiss the amended supplemental complaint.

Appendix G

Reported in 333 F.2d 257
United States Court of Appeals
for the Ninth Circuit

Nos. 17709,
18192

Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and John Janney,
Appellants,
vs.
Helen Dolman, et al.,
Appellees.

John Janney,
Appellant,
vs.
Helen Dolman,
Appellee.

[May 21, 1964]

Rehearings Denied August 3, 1964.

Before: HAMLEY, BROWNING and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge.

Before us are 10 appeals, 9 in No. 17,709 and 1 in No. 18,192, all of which have been consolidated here.

• • • •

1. *The appeal in No. 18,192.*

In No. 18,192 there is but one appeal. That action, numbered 310 below, was begun by appellee Dolman as a stockholder of Ely Valley Mines, Inc., a Nevada corporation (Ely), and Pioche Mines Consolidated, Inc., a Nevada corporation (Pioche), and on their behalf, seeking access to the records of the corporations. The defendants are John Janney, President, and one Calhoun, Secretary, of each of the two corporations. An amended complaint was filed on February 18, 1960, accompanied by a motion for an order granting access to the records, supported by an affidavit. The court, on the same day, granted the motion by an ex parte order. Armed with the order, Dolman did obtain an examination of the records.

• • • •

2. *The appeals in No. 17,709.*

In No. 17,709, there are nine appeals. The action, No. 311 in the trial court, was filed by Dolman on February 20, 1960. It is a stockholders' derivative action, brought on behalf of stockholders of Pioche and Ely against them as nominal defendants, and Janney and a number of Does. It alleges that plaintiff is a citizen of California, that the two corporations are Nevada corporations.

• • • •

The case (No. 311) was consolidated with certain other pending cases by an order made November 3, 1960. These are Fidelity-Philadelphia Trust Company v. Pioche Mines Consolidated, old No. 101, now No. 1221 (the Fidelity case), action No. 310, and Dodd, et al. v. Pioche Mines

Consolidated, No. 1523 (the Dodd case). This order also set aside the hearing dates of all pending matters, and set pretrial for December 8.

• • • • •

Appeal No. 4

On February 6, 1962, a motion was filed for an order requiring Dolman, et al., to give security in connection with the restraining order, as required by Rule 65(c), F.R.Civ. P. On March 16, 1962, a formal order, appointing one Americo Campini receiver of the two corporations, with bond of $150,000, was signed and filed. This order also contains a restraining order similar to that of February 5. On April 6, 1962, a notice of appeal from the March 16 order was filed. We call this

Appeal No. 5.

On March 20, 1962, the receiver petitioned for instructions. This petition was granted, and the receiver instructed, on the same day. On April 6, 1962, a notice of appeal from the March 20 order was filed.

• • • • •

On May 24, the court made an order instructing the receiver. On May 31, 1962, a notice of appeal from this order was filed. We call this

Appeal No. 8.

On October 8, 1962, judgment was filed and entered. This judgment continues the receivership, restrains appellant Janney and the corporations from disposing of any of the assets or records of the corporations, restrains Janney from disposing of his stock in the corporations, and gives

judgment in favor of the receiver and against Janney, in the sum of $1,000,000, plus interest and costs of $1,299.29. It awards Dolman her expenses in prosecuting the action, plus "compensation" for her services, and fees to her attorneys. It directs that sums collected be apportioned between and paid to Dolman, her attorneys, and the stockholders of Pioche Mines Consolidated, Inc., exclusive of Janney. It retains jurisdiction for two purposes: to change the amount of the receiver's bond, and to instruct the receiver. Findings of fact and conclusions of law were filed at the same time. A notice of appeal from this judgment was filed on October 16, 1962. We call this

Appeal No. 9.

• • • •

The court did err, however, in ordering the default of the corporations. Appellees' counsel expressly stated that their motion was directed solely to the striking of Janney's pleadings and the entry of his default, and that he was not asking for such relief against the corporations. Nevertheless, the order that counsel prepared, and that the court signed, orders that the defendants' pleadings be stricken, and their default entered. The judgment is to the same effect. We think that, while Rule 37(d) gave the court authority to enter the default, it should not have done so, as to the corporations, when such relief was not sought. The rule itself provides for a motion and notice, and counsel made it clear, when the motion was heard, that his motion was not aimed at the corporations.

When this discrepancy between the motion and the resulting order was called to the court's attention, it declined

to change it, apparently accepting the representation of appellees' counsel that default of the corporations was technical only, since they were nominal defendants against which no relief was sought. This view, however, failed to take account of the motion to appoint a receiver over the corporations. Moreover, in striking the pleadings of the corporations, the trial court struck counterclaims by which the corporations had asserted claims for relief against plaintiff Dolman. We consider at a later point the significance of this error.

• • • •

D. *The Receivership.*

We have concluded that it was error to appoint a receiver for the two appellant corporations, for several reasons.[5]

First, the prayer of the complaint is insufficient to permit the appointment on a default. The prayer, so far as material is as follows:

> "4. That said corporations, and each of them, and the said JOHN JANNEY, be restrained from exercising any control or entering into any transaction with regard to the said corporations, until further order of this Court."

We think that a receivership is so different from an injunction that this can hardly be held to give notice to appellees that a receivership would be sought. (See Pueblo Trading Co. v. El Camino Irr. Dist., 9 Cir., 1948, 169 F.2d 312)

Second, as we have already held, it was error to enter the default of the two corporations. The default of Janney alone would not justify a default receivership of the corporations. His sole interest in that question would be in his

capacities as president of and as a stockholder in each. The corporations were entitled to contest the application, and this right was not accorded to them. Not every receivership is beneficial to a corporation. There is always expense involved. Sometimes a receivership results in insolvency. Thus they were prejudiced by the entry of their defaults.

Third, we do not think that a receivership would be proper in this case in any event. Receivership is an ancillary remedy, and the substantive relief here sought does not justify its use. The only claims for substantive relief stated in the amended complaint are two. One is that the court should see that certain taxes be paid upon undesignated real properties. This has been done, and the matter is moot. The other is for $1,000,000, on behalf of the corporations and against Janney. This has been awarded, as to Pioche. The only ancillary relief asked is the injunction referred to in the portion of the prayer quoted above. A receivership is not an end in itself; it is but a means to an end. Here no end was sought. Under the judgment, none is in sight.

• • • •

The orders appointing the receiver, and the portion of the judgment that continues the appointment, must be reversed. The receiver must be required to account and to deliver the properties of the respective corporations to them, and be then discharged. (See Brictson Mfg. Co. v. Close, 8 Cir., 1922, 280 F. 297, 301)

E. *The Injunction.*

The court, by minute order of December 6, 1961, ordered the issuance of a temporary restraining order. This was embodied in a formal order on January 24, 1962. The order provides:

> "IT IS HEREBY ORDERED that the abovementioned defendants, and each of them, are hereby restrained from disposing of any and all assets, including moneys, of the abovementioned defendant corporations until further order of this Court;"

The court did not require a bond as provided in Rule 65(c) F.R.Civ.P. The order appointing the receiver, of March 16, 1962, also contains an injunctive provision as follows:

> "IT IS FURTHER ORDERED that said defendant corporations, their officers, managers and agents, are restrained from disposing of, transferring or removing any of their assets, properties, books, files, records and accounts, and they and each of them and all other parties having property in their possession or under their control belonging to said corporations are hereby directed to deliver the same to said receiver."

It requires a receiver's bond of $150,000. The first order fails utterly to comply with Rule 65(d); the second complies. The bond, however, is not the customary form of bond issued when an injunction is obtained (Rule 65(c)).

The judgment contains the following injunctive provisions:

> "Said defendant corporations, their officers, managers and agents, are restrained from disposing of, transferring, or removing any of the assets, properties, books, files, records and accounts of said corporations, and they and each of them and all other parties having property in their possession or under their control belonging to the said corporations are hereby directed to deliver the same to said Receiver.
>
> "Defendant John Janney is hereby restrained from disposing of or otherwise hypothecating his stock in

the following corporations: Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., Pioche Power & Light Company."

Appeals Nos. 4, 5, 7 and 9 relate to these matters.

The order of January 24, 1962 must be reversed for failure to comply with Rule 65(d). The order of March 16, 1962 must be reversed because it is in aid of the receivership, as to which it is also being reversed.

The judgment, insofar as it enjoins anyone other than Janney, must also be reversed, because of the error in entering the default of the corporations. As it relates to Janney, it must be reversed insofar as it enjoins him from disposing of his stocks.

• • • •

G. *The Form of the Judgment.*

The judgment awards the receiver $1,000,000.00 against Janney, "for the benefit of Pioche Mines Consolidated, Inc. stockholders," exclusive of Janney. It further directs that moneys collected be paid direct to the stockholders of Pioche, exclusive of Janney and of any other stockholders whom the court may hereafter designate.

This is error. Pioche is still an existing corporation, and the judgment belongs to it. (19 C.J.S. Corporations § 833d, pp. 254-255) Moreover, its creditors, if any, have rights against its assets that are superior to those of its shareholders. The judgment also confiscates a portion of the value of Janney's stock, which, so far as the record shows, is lawfully issued and outstanding. Its effect is to give his fellow shareholders a double recovery against him. We know of no rule of law or equity that supports this result. In these respects, the judgment must be reversed.

H. *The Orders Instructing the Receiver.*

Appeals Nos. 5 and 8 bring before us two orders instructing the receiver (28 U.S.C. § 1292(a) (2)). The first is the ex parte order of March 20, 1962. It authorizes the receiver:

1. To employ counsel for Dolman as his counsel, on terms to be determined by the court.

2. To close the office of the corporations at Pioche and open an office at Las Vegas.

3. To employ a watchman at Pioche.

4. To open a checking account.

5. To advance $6,500 of his own funds, and issue to himself a receiver's certificate in that amount.

6. To pay a number of expenses:

(a) $300 per month for watchman.

(b) $100 per month for office overhead.

(c) Insurance premiums, in an amount to be determined.

(d) $1500 premium on his bond.

(e) $3500 to his attorneys for costs to be incurred in the Fidelity case.

(f) Up to $260 for expenses in preparing an inventory.

(g) Up to $500 for his travel and other incidental expenses.

7. To terminate any present employee of the corporations.

8. To take physical possession of all corporate assets.

The second is the order of May 24, 1962. This orders the receiver to take charge of the prosecution of the counterclaim of Pioche in the Fidelity case and for that purpose to retain counsel for Dolman. It restrains Janney and his attorneys from interfering with the receiver in so doing, and requires that they turn over to him all papers and evidence relating to the matter. It further authorizes the receiver to issue certificates, upon terms later to be authorized, and to use funds thus raised to pay the expenses of the litigation. The order expressly recognizes the right of Janney and his counsel to participate in the trial, "in cooperation with the Receiver and Intervenor [Dolman] and their counsel."

[20-22] Since we hold that the appointment of a receiver was erroneous, these orders must be vacated.

• • • •

3. The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed.

4. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims.

5. The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.

6. The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

7. The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

• • • •

12. The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.

13. The matter is remanded to the trial court with directions.

a. To modify the judgment in the manner hereinabove ordered.

b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.

c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.

d. To take all other actions necesessary to carry out the foregoing orders, and such further proceedings as shall be consistent with this opinion.

Appendix H

Reported in 336 F.2d 789
United States Court of Appeals
for the Ninth Circuit

Nos. 18402,
18770, 19005

Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and John Janney,
Appellants,
vs.
Helen Dolman, et al.,
Appellees.

[September 23, 1964]

Before: HAMLEY, BROWNING and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge.

These appeals involve matters occurring subsequent to the judgment in the case of Dolman v. Pioche Mines Consolidated, Inc., et al., No. 311 in the United States District Court for the District of Nevada, Pioche Mines Consolidated, Inc. v. Dolman, 1964, 9 Cir., 333 F.2d 257, No. 17,709 in this court. On appeal from the judgment and from certain other orders in that case, we reversed in part and affirmed in part, and remanded the matter for further proceedings.

Appellants have filed a document which they entitle Motion for Summary Reversal. Appellees have replied and appellants have answered that reply. In view of the positions taken by the parties, we are of the view that oral argument is not necessary in connection with any of these appeals.

• • • •

The order of March 13, 1963 granting a request of the receiver to sell certain corporate assets is reversed and the matter is remanded to the district court for further proceedings consistent with the directions given by us on remand in Pioche Mines Consolidated, Inc., et al. v. Dolman, et al., No. 17,709.

In No. 19,005 the order of August 29, 1963 directing the filing of the receiver's account, authorizing him to accept an offer for the purchase of certain corporate assets, and permitting him to reimburse himself for certain claimed costs, to pay certain attorneys' fees, to reimburse his attorneys for certain claimed costs, and to pay himself a fee, is reversed, and the matter is remanded to the district court for further proceedings consistent with the directions given by us on remand in Pioche Mines Consolidated, Inc., et al. v. Dolman, et al., No. 17,709.

Appendix I

Reported in 385 F.2d 188

United States Court of Appeals
for the Ninth Circuit

Nos. 19745,
19761 and 21099

Ely Valley Mines, Inc., et al.,
Appellants,
vs.
Lawrence Rust Lee, et al.,
Appellees.

Ely Valley Mines, Inc., and Pioche Mines Consolidated, Inc.
Appellants,
vs.
Helen Dolman, et al.,
Appellee.

Ely Valley Mines, Inc., et al.,
Appellants,
vs.
Helen Dolman, et al.,
Appellee.

[November 8, 1967]

Before: HAMLEY, BROWNING and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge:

These appeals relate to orders made by the District Court after it had entered a new judgment pursuant to our

mandate in Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 1964, 333 F.2d 257, cert. denied, 1965, 380 U.S. 956, 85 S.Ct. 1081, 13 L.Ed2d 972. In No. 19,745, the appeal is from an order striking the answer of appellants Ely Valley Mines, Inc. and Pioche Mines Consolidated, Inc. to the amended complaint. In No. 19,761, the appeal is from a restraining order. In No. 21,099, the appeal is from an order denying a motion to amend the judgment entered upon our mandate and an order relating to costs.

At the outset, we find it necessary to consider a misapprehension under which appellees, and perhaps the District Judge, seem to be laboring. Appellees urge that the appeal is not really taken by the two corporate appellants but by John Janney and that therefore we should not recognize or take cognizance of the appeals. And the court, in its order striking the answer of the corporations in our No. 19,745 (a document prepared by appellees' counsel) recites:

> "11. That the said document is purportedly filed on behalf of defendant corporations by defendant JOHN JANNEY; that the said JOHN JANNEY has heretofore been enjoined from acting on behalf of the said corporations, which said injunction has become final after appeal."

There is nothing whatever in the record to support this notion. Only two things have happened to Mr. Janney. First, Pioche Mines Consolidated, Inc. has a judgment against him for money. Second, he is enjoined by that judgment from "disposing of, transferring, or removing any of the assets, properties, books, files, records and accounts" of the two corporations. But the judgment does not outlaw Janney, either personally or as president of

either corporation, much less does it outlaw the two corporations. It certainly does not prohibit either corporation from asserting whatever right it may have in this litigation. Each is entitled, like every other litigant, to its full day in court, whether its pleading be signed or vertified on its behalf by Janney as its president or by some other officer or agent. Each is entitled to have its counsel recognized in this case, whether or not they were retained on its behalf by Janney as president. He has not been removed as president. The directors and other officers have not been removed from office. And we have held that this is not an action for such relief. (See 333 F.2d at 273.) If appellees could bring themselves to recognize this fact a lot of the sparring and name calling that has gone on in this case might cease, and it ought to be possible to hear and decide the remaining issues on their merits and with reasonable dispatch.

Appellees assert that so long as Janney remains as president of Pioche Mines Consolidated, Inc., he will not permit the corporation to enforce its judgment against him. To this there are at least three answers. First, the injunction which we have just quoted would prevent him from disposing of or transferring that judgment. Second, as we pointed out in our prior opinion, there are means whereby the stockholders can elect new directors who will appoint new officers, or can get other appropriate relief. Third, if the stockholders, knowing the facts, should, in a lawful manner, decide that the judgment against him should not be enforced, they could probably do so, whether appellees like it or not.

• • • •

This litigation has been pending since 1960. Companion cases have been pending much longer. The judge has been on the receiving end of charges of various kinds of misconduct, levelled at him by Janney and the appellants and their counsel, during most of this time. He has borne himself with more patience than the members of this panel might have shown under similar provocation. We are not surprised to find that, from time to time, he has shown some annoyance at the behavior of these parties and their counsel. They may well have goaded him into taking more drastic actions than he would otherwise have taken. See our prior opinion, supra, and our decisions in Pioche Mines Consolidated, Inc. v. Fidelity-Philadelphia Trust Co., 9 Cir., 202 F.2d 944 and 206 F.2d 336, Pioche Mines Consolidated, Inc. v. Foley, 9 Cir., 237 F.2d 164, and Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 336 F.2d 789.

• • • •

The restraining order appealed from in No. 19,761 is dated September 2, 1964, and reads:

> "Upon the reading of the affidavit of Americo L. Campini herein, and good cause appearing therefor, IT IS HEREBY ORDERED that defendant John Janney, directly and indirectly, by and through T. David Horton, Victor Cottino, and all other agents of said John Janney, are hereby restrained from attempting to occupy, possess, or in any way exert dominion or control over the properties of Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc.
>
> IT IS FURTHER ORDERED that each and all of said persons are to be removed from said properties forthwith."

Our mandate in Pioche Mines Consolidated, Inc. v. Dolman directed, among other things, that the court:

> "• • • vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him." (333 F.2d at 277-278.)

Obviously, the requirement that the properties of the corporations be delivered to them is subject to the normal delays incident to termination of a receivership. But if it appears that there is to be substantial delay in settling the receiver's accounts, as there has been here, and unless it also appears that there is some valid reason why the receiver should retain possession, the return of the properties and records should not await settlement of the receiver's accounts. The continued retention of them by the receiver is a continuing wrong to the corporations. So far as appears, the restraining order is still in effect, and the receiver is still in possession. The restraining order must be reversed. The properties and records should be surrendered forthwith, unless the court determines, promptly, that there is a good reason for not doing so. As we have pointed out, the fact that Janney is still the president of each corporation is not such a reason.

Appendix J

Reported in 410 F.2d 742

United States Court of Appeals
Ninth Circuit

No. 22700

Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc.,
Petitioners,
vs.
The Honorable Roger T. Foley, Judge of the United States District Court for the District of Nevada,
Respondent.

[April 28, 1969]

Before: HAMLEY, BROWNING and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge:

Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. petition this court for a writ of mandamus directing the District Judge to order the immediate return of their properties and records now held by the receiver appointed by the court.

On August 3, 1964, in Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257, we held (p. 273):

"The orders appointing the receiver, and the portion of the judgment that continues the appointment, must

be reversed. The receiver must be required to account and to deliver the properties of the respective corporations to them, and be then discharged."

We remanded the case with directions, *inter alia:*

"To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him."

The trial court thereafter refused to order return of the properties because the receiver had not yet accounted. The corporations then sought leave to file a petition for a writ of mandate with this court, which we denied without opinion.

Next, the trial court issued a restraining order enjoining John Janney, the president of the two corporations, and his agents, from attempting to occupy or control the corporations' properties. On appeal, we reversed on November 8, 1967. Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188. In that opinion we pointed out that our denial of leave to file the petition for a writ of mandate was not an affirmance of the court's order refusing to require the receiver to deliver the companies' properties. We also said (p. 193):

"Obviously, the requirement that the properties of the corporations be delivered to them is subject to the normal delays incident to termination of a receivership. But if it appears that there is to be substantial delay in settling the receiver's accounts, as there has been here, and unless it also appears that there is some valid

reason why the receiver should retain possession, the return of the properties and records should not await settlement of the receiver's accounts. The continued retention of them by the receiver is a continuing wrong to the corporations. * * *

"The properties and records should be surrendered forthwith, unless the court determines, promptly, that there is a good reason for not doing so. As we have pointed out, the fact that Janney is still the president of each corporation is not such a reason."

We hoped that this would dispose of the matter. Unfortunately, it did not, for in the meantime Janney died. Counsel for the plaintiffs and the receiver, and the trial court, seized upon this fact as a basis for claiming that there are no officers or directors of either corporation to whom the properties can be returned. This, in spite of the clear statement in our first opinion (333 F.2d at 272-273) that the action was not one for the replacement of the officers and directors, and in our second opinion (385 F.2d at 190) that the judgment did not outlaw the corporations, and that the directors and other officers had not been removed from office. There is not a shred of evidence in the record to support an assertion that those persons listed as officers, directors, and agent of each corporation, as filed each year with the Secretary of State of Nevada, pursuant to Nevada law (Nev.Rev.St. § 78.150) are not, at the very least, *de facto*[1] what they purport to be.[2] There is no suggestion that anyone else occupies any of those positions. It simply does not lie in the mouth of the receiver, who is illegally in possession of the corporations' properties, or of the plaintiffs, who wrongfully obtained his appointment, or of the judge, who erroneously appointed him, to assert

otherwise. A wrong cannot be perpetuated in any such fashion. The trial court has failed to comply with the mandates of this court.

Let a writ of mandamus issue directing respondent forthwith to order the return by the receiver of the properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. to any officer, director or agent of each, named in the current annual lists of officers, directors, and resident agent required by Nev. Rev.St. § 78.150, and to restrain the receiver from in any manner whatever further interfering with the possession and use, by each corporation, of its properties, books, files, records, or accounts.

Supreme Court, U. S.
FILED
MAR 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

NO. 78-1309

PIOCHE MINES CONSOLIDATED, INC.,
Petitioner

v.

FIDELITY PHILADELPHIA TRUST COMPANY,
Respondent

OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI OR WRIT OF MANDAMUS

To the United States Court of Appeals for the Ninth Circuit

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OCTOBER TERM 1978

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PIOCHE MINES CONSOLIDATED, INC.,
Petitioner

v.

FIDELITY PHILADELPHIA TRUST COMPANY,
Respondent

OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI OR WRIT OF MANDAMUS

To the United States Court of Appeals for the Ninth Circuit

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable, the Associate Justices of the United States Supreme Court:

FIDELITY PHILADELPHIA TRUST COMPANY, Respondent herein, by WILLARD P. NORBERG and RICHARD P. BROWN, its attorneys, respectfully submit this opposition to the petition for writ of certiorari or writ of mandamus heretofore filed on behalf of PIOCHE MINES CONSOLIDATED, INC. to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, reported at 587 F.2d 27 (1978).

OPINION BELOW

The opinion of the Court of Appeals, and its order denying a rehearing, are correctly set forth in Appendix B of the petition. Petitioner asserts that no opinion was rendered by the United States District Court for the District of Nevada, yet fails to note that a detailed ruling, with factual findings, was issued by the United States Magistrate, to whom the matter had been referred by written consent of the parties. The Magistrate's ruling, dated June 18, 1976, which was accepted by the District Court as its final order, is attached as Appendix A hereto.

JURISDICTION

Respondent accepts the statement of the Court's jurisdiction set forth in the petition.

QUESTIONS PRESENTED

Petitioner asserts, as an initial question, the issue of whether the Court of Appeals "abused its discretion in affirming a judgment of the United States District Court for the District of Nevada" which dismissed, for want of prosecution, a counterclaim that had been pending for over 20 years. Such assertion is, of course, patently erroneous; the only question is whether the District Court abused its discretion in ordering the dismissal in accord with appropriate findings and substantial evidence. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 2780 (1976).

The additional questions purportedly raised, asserting constitutional issues and alleged misuse of process were not raised below and were presumably added to infuse some

semblance of legal import into a purely factual dispute having significance only to the immediate parties.

CONSTITUTIONAL PROVISIONS INVOLVED

Contrary to the assertion of the petition, there are no constitutional provisions involved.

STATEMENT OF THE CASE

The petition relates to a counterclaim by Pioche Mines Consolidated (hereinafter referred to as "Pioche") against Fidelity Philadelphia Trust Company (hereinafter referred to as "Fidelity") which was originally filed in 1940. Its final version, referred to as the Second Amended Supplemental Counterclaim, with allegations encompassing the period from 1925 to 1955, was at issue by early 1956. An initial motion by Fidelity to dismiss this counterclaim for lack of prosecution was denied in 1961. In view of the continued failure to bring the matter to trial, a second motion to dismiss was filed in June 1974 and, by order of the District Court, was referred to U. S. Magistrate Joseph L. Ward.

Counsel for both parties filed written consent to a determination of the motion by the Magistrate and agreed to accept the Magistrate's ruling as a final decision of the District Court, subject to the right to file objections as provided by local rules. After a lengthy hearing and voluminous briefing, the Magistrate, on June 18, 1976, filed his formal ruling granting the motion to dismiss the counterclaim for want of prosecution. The factual findings in support of the ruling include lack of diligence in bringing the counterclaim to trial without a showing of sufficient

excuse or justification, lack of evidence to show an intent to reactivate or prosecute the counterclaim until long after filing of motion to dismiss, and the substantial prejudice suffered by Fidelity because of the delay.

Objections to this ruling were overruled by the District Court and judgment was entered dismissing the counterclaim. This judgment was affirmed by unanimous decision of the Court of Appeals for the Ninth Circuit, which agreed that there was no excuse for at least the last five or six years of inactivity and that, accordingly, there was no abuse of discretion by the trial court in dismissing the counterclaim.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The facts of this case are unique, unlikely to recur, and have no importance sufficient to warrant this Court's attention.

Even if it be assumed that the circumstances set forth in the petition, recited without even a minimal attempt to indicate any substantiation in the record below, bear any relationship to the relevant and material evidence, it is apparent that this is a unique case, involving factual and procedural aspects that would never arise again. The exercise of discretion by a trial court, in this instance to dismiss a claim pending for over twenty years, is not a matter that merits the attention and time of this Court. The inclusion of alleged constitutional issues indicates that petitioner is aware that a mere factual attack on the exercise of discretion by the trial court is not a sufficient basis to warrant grant of certiorari.

2. A review by this Court would involve only questions of evidence which have already been decided, adversely to petitioner, by a U.S. Magistrate and four judges below.

U.S. Magistrate Ward, District Judge Roger Foley, Jr., District Judge Muecke sitting by designation with the Circuit Court, and Circuit Judges Barnes and Goodwin reviewed the evidence presented in support of and in opposition to the motion to dismiss the counterclaim for want of prosecution. All agreed that substantial evidence warranted the dismissal and rejected contrary arguments presented by petitioner. All that is really involved in the petition is an attempt to obtain one more factual review of the voluminous procedural record below, extending back to 1940. There is no justification for further review of this evidentiary morass.

3. The decision below gave full consideration to the issues and decided them correctly in accord with controlling rules governing the exercise of discretion under the factual circumstances presented.

The opinion below evidences a careful consideration of the record in the trial court and of the contentions advanced by petitioner in its unsuccessful attempt to excuse its patent failure to prosecute the counterclaim in a reasonably diligent manner. In holding that there was no abuse of the discretion accorded to a trial court under the circumstances presented, the Court of Appeals relied on well established and controlling legal precedents in the Ninth Circuit. These legal precedents are fully in accord with the guidelines set forth by this Court in similar cases. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386

(1962) and *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778 (1976).

CONCLUSION

The counterclaim involved herein was originally filed in 1940 and was at issue, in an amended form, as early as 1956. The trial court made specific findings, supported by substantial evidence, of lack of diligence in prosecution for at least six years, with actual prejudice resulting to the counterclaim defendant. If dismissal of such a proceeding was not an appropriate exercise of discretion, it is difficult to envisage any set of facts that would permit a District Court to eliminate the deadwood from an overcrowded trial calendar. Any further consideration would be a waste of judicial time and effort. Certiorari, therefore, should be denied.

Dated: March 21, 1979.

Respectfully,

WILLARD P. NORBERG
Attorney for Respondent

(Appendix A Follows)

APPENDIX A

Appendix A

In the United States District Court
for the District of Nevada

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CAROL C. FITZGERALD
By ROCHELLE BICKEL
Deputy

Entered Jun 18 1976
Clerk, U.S. District Court
District of Nevada
By ROCHELLE BICKEL
Deputy
Civil #2

Fidelity-Philadelphia Trust Co., et al.,
Plaintiffs,

vs.

Pioche Mines Consolidated, Inc., et al.,
Defendants.

RULING BY THE MAGISTRATE ON THE MOTION TO DISMISS COUNTERCLAIM FOR WANT OF PROSECUTION

The motion of The Fidelity Bank to dismiss the defendant's counterclaim for want of prosecution having regularly come before me on November 7, 1975, all parties being represented by counsel, and extended oral and written argument having been presented, the following ruling is hereby made:

1. Defendant's Second Amended Supplemental Counterclaim, filed on June 30, 1955, incorporating by reference

certain claims set forth in a prior counterclaim filed in 1941, has been at issue since April 24, 1956 without having been brought to trial. Counterclaim-defendant filed this motion to dismiss for lack of prosecution in June 1974; the motion was originally granted by this Court's minute order dated October 15, 1974, but said order was subsequently set aside to permit counterclaimant to respond to the motion.

2. Although there were intervals during the period since 1956 in which there were substantial difficulties impeding prosecution of the counterclaim, there has been no real display of diligence during those periods of time, such as from 1969 to 1975, when this counterclaim could have been pursued; moreover, counterclaimant has not shown that it pursued other available avenues and devices that might have been employed to remove what it claims to be the delays that prevented it from pursuing the counterclaim.

3. During the period since May 7, 1969, the date of the Order by Judge Roger D. Foley directing the receiver to return the properties, books, files, records, and accounts of Pioche to its officers, the counterclaim could have been pursued and brought to trial. There was no display of diligence by the counterclaimant during this extended period of inactivity, and there has been no showing of legally sufficient excuse or justification for the failure to prosecute the counterclaim during these years.

4. The record indicates no action on the part of the counterclaimant or its counsel that would indicate an intent to reactivate or prosecute the counterclaim until January 1975, seven months after the filing of the motion to dismiss

and three months after the Court's minute order of October 25, 1974, initially granting the motion. Such inaction constitutes a clear failure, without sufficient excuse, to exercise that due diligence required in cases such as this where claims have been pending for many years.

5. Under the circumstances shown by the record, the counterclaim defendant has suffered substantial prejudice from the counterclaimant's failure diligently to prosecute the counterclaim.

RULING

For the reasons above stated, it is the ruling of the United States Magistrate that the motion to dismiss the second amended counterclaim for want of prosecution should be and is hereby granted.

DATED: June 18, 1976

JOSEPH L. WARD
Joseph L. Ward
United States Magistrate

Approved as to Form:
T. David Horton
Attorney for Counterclaimant
Willard P. Norberg
William K. Woodburn
Attorneys for Counterclaim-defendant

By WILLARD P. NORBERG
Willard P. Norberg

I hereby certify that on 7-18-76
I caused to be mailed to all counsel
of record in this action a true copy
of this document.
CAROL C. FITZGERALD, Clerk
By ROCHELLE BICKEL
Deputy